

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 399 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

MOHANLAL THAKERSINHBHAI AMETHIA

Versus

STATE OF GUJARAT

Appearance:

MR YOGESH S LAKHANI with MR NISHIT P. THAKKAR
for Petitioners
MR BY MANKAD, APP for Respondent

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 02/11/2001

ORAL JUDGEMENT

1. This Revision Application has been filed by the original accused of Criminal Case No. 488/86 of the Court of Judicial Magistrate, First Class, at Kalavad,

District Jamnagar, being aggrieved and dissatisfied with the judgment and order of learned Sessions Judge, Jamnagar, dated 27th September, 1994, in Criminal Appeal No. 32 of 1988, by which conviction awarded by the learned J.M.F.C., Kalavad to the present petitioners in Criminal Case No. 488 of 1986 for the charges under Section 7(1) read with Section 16(1)(a) of the Prevention of Food Adulteration Act, 1954 was confirmed by the learned Sessions Judge, Jamnagar.

2. Brief facts of the case and very material data for deciding this Revision is as under :

The then Food Inspector Mr.J.M.Soni, predecessor of respondent herein Mr. S.B. Bhatt obtained a sample of "Tikha Ganthiya" (farsan) from Chetna Hotel, Ranuja. At that time, present petitioner No.1 was present while present petitioner No.2 was the owner of the said Chetana Hotel. Material dates are; the sample was purchased by the Food Inspector on 15.5.1985; the sample was sent to the Public Analyst at Bhuj by the Food Inspector on 16.5.1985; on 21st May, 1985 the sample was received by the Public Analyst; on 24th May, 1985 the sample was analysed and examined by the Public Analyst; on 12th June, 1985 a certificate i.e. report of Analysis was signed by the Public Analyst but sent the same on 13.6.1985 to Local Health Authority. Thereafter, the complaint against the present petitioners came to be filed on 25.7.1986 about after 15 months after obtaining the sample of farsan. The present petitioners were served with the copy of analyst report on 4th August 1986. Charge under the Prevention of Food Adulteration Act, 1954 for the offences punishable under Section 7 read with Section 16 was framed against the present petitioners. The Public Analyst report which is on record at Exh. 32 declared following result in respect to the analysis of the sample taken from the petitioners:
"Description of sample : Yellowish colour farsan

1. Artificial colouring matter - Metanil
Yellow coal-tar colour detected.
2. Test of castor oil (on extracted oil) -
negative.
3. Test for mineral oil (on extracted oil) -
negative.
4. Test for E.O.A.A. - Negative

3. Therefore, in the opinion of Public Analyst,

Public Health Laboratory, Bhuj - Kutch, the sample "farsan" did not conform to the standards laid down under Prevention of Food Adulteration Rules, 1955 because analysis revealed Metanil Yellow Coal-tar Colour in sample, which was prohibited colour, under the Rules of Prevention of Food Adulterations Rules, 1955. After completing the trial, the accused were found guilty for the aforesaid offences and were sentenced to undergo six months simple imprisonment and a fine of Rs. 1,000/-, in default simple imprisonment of 9 months.

4. Being aggrieved and dissatisfied with the decision of learned Judicial Magistrate, First Class, Kalavad, which was pronounced on 5th of March, 1988, the above said Criminal Appeal No. 32 of 1988 came to be filed in the Court of Sessions, Jamnagar and learned Sessions Judge, Jamnagar, was pleased to dismiss the Appeal of the present petitioners vide his Order dated 27th September, 1994, confirming the order of conviction as passed by the learned Judicial Magistrate, First Class, Kalavad and hence this Revision Application.

5. Learned Advocate Mr. Y.S. Lakhani with learned Advocate Mr. Nishit P. Thakkar for the petitioners and learned APP Mr. B.Y. Mankad for the respondent - State were heard at length.

6. Various grounds were pressed on behalf of the petitioners before both the lower courts which were not considered by both the lower courts to be the grounds for acquittal of the accused.

7. Mainly, in this Revision Application, on behalf of the accused - present petitioners, four main grounds were urged vehemently. First was regarding Rule 7 of the Prevention of Food Adulteration Rules, 1955 and stress was put on sub-rule (3) of Rule 7 that the Public Analyst, shall within a period of forty five days from the date of receipt of any sample for analysis, send by a registered post or by hand to the Local Health Authority a report of the result of such analysis in Form III. It was urged that in this case, admitted facts are, the sample was received by the Public Analyst on 21.5.1985, and which was analysed on 24.5.1985, and the report was signed on 12.6.1985 by the Public Analyst. It was urged that it is not proved whether the Public Analyst, as per sub-rule (3) of Rule 7, has sent such report to the local health authority within a period of 45 days from the receipt of sample for analysis. It is urged that the prosecution, vide Exh.33 a letter of Local Health Authority addressed to the Food Inspector, attempted to

prove that such letter which was received by the Public Analyst was dated 13.6.1985. It was urged that it is therefore not proved that whether Local Health Authority received report of the Public Analyst within 45 days as per Rule 7(3). It is urged that this is breach of mandatory rules and on this ground the accused are entitled to acquittal.

8. Second contention was regarding the time difference between analysis of the sample and signing the same by the Public Analyst, which is about 18 days as per the dates mentioned above. It was urged that no proof or explanation for signing the report late is forthcoming from the prosecution, then the possibility of interchanging the result of analysis cannot be ruled out. Both the courts below, it was urged that, did not take this fact into consideration.

9. The third contention, which was raised regarding the report of analysis at Exh. 32. After relying upon some decisions, which will be hereinafter discussed, learned Advocate for the petitioners vehemently urged that the report of the analysis must lay down complete data of the tests carried out by him and the results. The Exh. 32 does not contain such data and, therefore, cannot be considered as valid opinion of an expert. It was urged that time and again the courts of law have warned Analysts to make their report so detailed that the court dealing with such report can come to a definite conclusion. It was urged that therefore it was necessary that all the tests carried out by the Public Analyst ought to have been mentioned by him in the report. In this report, it was also urged that as per Rule 7 of Prevention of Food Adulteration Rules, the tests which are required to be taken are mentioned. Whether those tests were carried out by the Public Analyst has not been mentioned by him in his report and, therefore, no conviction can be awarded to the present petitioners basing such report.

10. The fourth contention on which the main stress has been placed on behalf of the petitioners is in respect of launching prosecution late by the Food Inspector for about 11 months after the receipt of the report by the Public Health Authority. Exh. 33 denotes that the report of the Public Analyst was sent to the Food Inspector vide letter dated 28.8.1985, which must have been received by the Food Inspector in couple of days, but the complaint came to be filed only on 25th July, 1986. It was urged that almost after 15 months of obtaining sample by the Food Inspector, a copy of the

report of Public Analyst came to be served upon the accused petitioners, so as to deprive the present petitioners from their right to get the second sample examined by the Central Food Laboratory. It was urged that no preservative, admittedly, by the Food Inspector was added to the sample, in the condition with the samples are being kept and due to the weather in this country, in 15 months, sample would be so deteriorated that it was impossible for the accused to exercise his right to get the sample examined from the Central Food Laboratory as per Sec. 13 (2) of the Prevention of Food Adulteration Act, 1954. Learned Advocate therefore argued that the accused were prejudiced in their defence by launching the prosecution late by the Food Inspector and accused cannot be convicted in these circumstances. Both the Courts below have erroneously considered this aspect of the case. Learned Advocate for the petitioners relied upon certain text books of the Chemistry and decisions of the Courts, which will be referred and discussed hereinafter. On this contention, it was urged that both the courts below erroneously convicted the present petitioners for the charges levelled against them and both the orders of conviction are required to be set aside.

11. As against that learned APP Mr. B.Y. Mankad contended that Rule 7(3) is not mandatory as has been held by the Courts of law including the Supreme Court unless it is shown that there is failure of justice, the non-compliance to Rule 7 sub-rule (3) would not vitiate the conviction of the present petitioners. So far as the next contention is concerned, learned APP Mr. Mankad relying upon certain decisions which will be referred hereinafter, contended that as per the Form-III of the Rules, the Public Analyst is not bound to give details of the tests which he carried out for the analysis of the sample and, therefore, it is not obligatory for the Public Analyst to give details of his examination of the sample. It was urged that on proper test it was found that Metanil Yellow Coal-tar was present in the sample which is prohibited colour by the Prevention of Food Adulteration Rules, 1955 and the sample was adulterated. The report Exh. 32 of the Public Analyst is a report of an expert and is admissible in evidence even without examining the Public Analyst. It was urged that there is no force in the contention that Public Analyst should give details of the tests he carried out. For the contention as to the signing by the report by the Public Analyst after 18 days of the analysis, it was contended that no prejudice is caused to the accused. It was urged that if the accused was not

satisfied with the report, it was open for them either to call the Public Analyst for the examination in cross or to send the second sample for the examination of the sample by the Central Food Laboratory. About the last contention raised, it was urged on behalf of the respondent by learned APP that filing of the complaint late ip so facto is not fatal to the prosecution. The accused will have to show the prejudice caused to him by launching the prosecution late by the Food Inspector. It was urged that while going through the evidence recorded, the accused have failed to show the prejudice caused to them. It was urged that the accused never attempted to apply to the court for sending second sample to the Central Food Laboratory for analysis. Relying on two decisions of the Apex Court, it was urged that unless and until, the accused exercise the right under Section 13(2) of the Prevention of Food Adulteration Act, 1954, they cannot contend that the sample is decomposed and deteriorated and prejudice is caused to them. It was urged that unless the Central Food Laboratory opines that the sample of food was deteriorated and decomposed, the same cannot be presumed. It was urged that since the accused have failed to show the prejudice caused to them because they did not send the second sample to the Central Food Laboratory, the launching of the prosecution late by itself is not fatal to the prosecution case, for which, as said above, learned APP relied upon two decisions of the Supreme Court, which will be referred to hereinafter.

12. Having heard both the counsels at marathon length and having gone through the record of the case, all the contentions raised on behalf of the petitioners are discussed. So far as Rule 7 is concerned, learned APP Mr. Mankad cited a decision in the matter of T.V. USMAN, vs. FOOD INSPECTOR, TELlichERY MUNICIPALITY, reported in AIR 1994 SC 1818. In para 15 of the above said decision, the Apex Court categorically observed that Rule 7(3) of the Prevention of Food Adulteration Rule, 1955 is only directory and not mandatory. It was observed that a slight delay would not render the report void or inadmissible in law. It was observed that only on the report of Public Analyst that concerned authority has to take decision whether to institute a prosecution or not and no time limit prescribed within which the prosecution has to be instituted and when there is no such limit prescribed there, there is no valid reason for holding the period of 45 days as mandatory. The Supreme Court further observed that it did not mean that the Public Analyst could ignore the time limit prescribed under the Rules. He must in all cases try to comply with

the time limit. But, if there was some delay in a given case, the same could not be the reason to hold that the report was void. Rule 7(3) is only a procedural provision meant to speed up the process of investigation on the basis of which the prosecution is to be launched. Therefore, in view of the clear observation of the Supreme Court, it cannot be said that the time prescribed by Rule 7(3) is to be scrupulously followed by the Public Analyst. What is required is the substantial compliance. The public Analyst has sent the report to the Local Health Authorities on 13th June, 1985 which is evident by Exh.33. Though, it was urged that this fact is required to be proved by other cogent evidence by the prosecution but Exh. 33 is exhibited and the contents therein can be said to be proved. Therefore, there is no substance in the contention that for the breach of Rule 7(3) of the Prevention of Food Adulteration Rules, 1955 and the accused are required to be acquitted.

13. So far as the second contention i.e. the time difference between the signing of the report by the Public Analyst and the analysis of the sample is concerned, Division Bench of this Court in the matter of STATE OF GUJARAT vs. VISHRAMDAS VIRUMAL, reported in 2000 (4) GLR 2884 has taken the view that the report signed by the Public Analyst is to be accepted by the Court as evidence and has to be read in evidence without formal proof and such report cannot be ignored by the Court or the accused raising doubt about the correctness of the report only on the ground that the report is signed by the Public Analyst later on and not on the date on which the sample was analysed. The Court observed that it was open for the accused either to examine the Public Analyst as a witness or it was open for him to send the sample to the Central Food Laboratory. Therefore, not signing the report on the day when the sample was analysed, that fact itself would not raise any doubt on the report of Public Analyst and the same would be admissible under Section 293 of the Cri. Procedure Code. In view of the decision of the Division Bench of this Court there is no force in the contention that the report of Public Analyst is doubtful when it was not signed on the day of the analysis or was signed 18 days later of analysis, unless it is shown by the accused that this delay, in fact, has caused failure of justice.

14. So far as the contention regarding the details of the test to be mentioned by the Public Analyst in Form-III report is concerned, learned Advocate Mr. Lakhani relied upon many decisions of the Punjab and Haryana High Court (i) in the matter of RAJ KUMAR vs.

UNION TERRITORY, CHANDIGARH, reported in 1999(1) FAC 38; (ii) in the matter of MAYA RAM vs. THE STATE OF PUNJAB, reported in 1987 (II) FAC 320; (iii) in the matter of SOM PARKASH vs. THE STATE OF HARYANA, reported in 1993(2) FAC 63; in the matter of GIRRAJ PARSHAD VS. THE STATE OF PUNJAB, reported in 1993(2) FAC 71. It was urged that in above said decisions, the High Court of Punjab and Haryana has taken a view that the test known as "Paper Chromatography Test" for the detection of coalter-dye is not a sound test and in some of the cases, the opinion of the Public Analyst based on such test, detection of Metanil Yellow Colter Colour, was rejected by some of the High Courts acquitting the accused. Learned Advocate Mr. Lakhani also relied upon a decision of this Court in the matter of MAHMAD HANIF SHAIKH IBRAHIM vs. STATE OF GUJARAT, reported in 1994 (2) GLR 1191, wherein a case under the Narcotic Drugs & Psychotropic Substances Act, 1985, this Court directed that what the report of the Analyst should contain. It was directed that the Public Analyst must mention the test carried out by him so the court can come to the conclusion and can appreciate the evidence and opinion of the expert. It was therefore urged that the report of Public Analyst - Exh. 32 cannot find the basis for the conviction of the accused.

15. The report of the Public Analyst, as per the Prevention of Food Adulteration Rules, 1955, is to be submitted by the Public Analyst in Form III as per Rule 7 of the Rules. Having perused the statutory provisions in this respect, it is clear that neither Form III as prescribed by the Schedule of the Rules nor Rule 7 itself suggests or indicates that the Public Analyst should mention all the details as to the tests carried out by him. On the contrary, Form-III indicates that the sample was received in condition fit or not fit for the analysis, and the same was tested or analysed and the result of such tests or analysis are stated below, denoting undoubtedly that the Public Analyst is not required to mention the tests which he carried out for analysis of the sample. Only, he is bound to give the results of the test and his opinion as to whether the sample is adulterated or not. This controversy raised on behalf of the petitioners must be set at rest in view of the decision of the Apex Court cited by learned APP Mr. Mankad. In the matter of DHIAN SINGH vs. MUNICIPAL BOARD, SAHARANPUR, reported IN AIR 1970 SC 318, in the report of the Public Analyst, following was mentioned :

Test for the presence of coal-tar dye - Positive

Coal-tar dye identified - Metanil yellow (Colour

On this report, the Supreme Court in para-7, clearly observed that it was not correct to say that the report did not contain the data on the basis of which the Analyst came to his opinion. The relevant data is given in the report. The Supreme Court approved the observation of the High Court of Allahabad in the matter of Nagar Mahapalika of Kanpur vs. Sri Ram, 1963 All LJ 765 = AIR 1964 All 270 wherein it was observed as under :

" that the report of the public analyst under Section 13 of the Prevention of Food Adulteration Act, 1954, need not contain the mode or particulars of analysis nor the test applied but should contain the result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated as defined in Section 2(1) of the Act.

16. This principle was followed by the Full Bench of the High Court of Kerala in the matter of STATE OF KERALA vs. MAMMU MUSALIAR, reported in 1975 CRI. LJ 409, and the Division Bench of the Gauhati High Court, in the matter of STATE OF ASSAM vs. BHAWARILAL KUNDALIA, reported in Cri. LJ 56. From these decisions, it is clear that the Public Analyst is not required to give the complete details of the tests which he carried out. What he is required to mention is the result of analysis, namely, data from which it can be inferred whether the article of food was adulterated or not under Section 2(j) of the Act. We cannot accept the contention of Mr. Lakhani that "data" means some details of test and unless this is mentioned, the report would be void. Going through the above decisions, it is clear that the Public Analyst report mentioned in the above decisions, instances of one of which is given above, denotes that the data means the result of analysis, from which the Public Analyst can come to the conclusion that the article of food was or was not adulterated. Data in this case would mean the mentioning in the report by the Public Analyst as under :

" Artificial colouring matter - Metanil Yellow
Coal-tar colour detected."

From the above data, the Public Analyst has formed his opinion that the sample was adulterated and hence there is no force in this contention also and the same is required to be rejected.

17. So far as the last contention is concerned, much

stress has been put by the learned Advocate Mr. Lakhani that the prosecution is launched late depriving the accused of their right to send the sample to the Central Food Laboratory as per Section 13(2) of the Prevention of Food Adulteration Act, 1955. Learned Advocate Mr. Lakhani has also placed reliance on certain decisions of the High Courts and the decision of the Supreme Court in the matter of MUNICIPAL CORPORATION OF DELHI vs. GHISARAM, reported in AIR 1967 SC 970. In this case, a sample of Dahi was obtained by the Food Inspector on September 20, 1961, which was analysed by the Public Analyst on October 3, 1961 and gave the certificate on October 23, 1961. He found that the sample was not conforming with the standard laid down by the Rules, a complaint was filed in the Court of Magistrate on 23rd May, 1962. On October, 1963, the accused applied under Section 13(2) to get the sample examined by the Central Food Laboratory. The Director, Central Food Laboratory, reported that the sample of dahi had become highly decomposed and no analysis of it was possible. In these circumstances, the Supreme Court held that inordinate delay in launching the prosecution deprived the right of the accused given by the statute under Section 13(2) and (5). It was observed that it was to be expected that the prosecution would proceed in such a manner that that right will not be denied to accused. The right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents and where there is denial of the right on account of the deliberate conduct of the prosecution i.e. delay in prosecution as a result of which the sample is highly decomposed and could not be analysed, the trial is undoubtedly seriously prejudiced and it would not be proper to uphold the conviction on the basis of the report of the Public Analyst. The Supreme Court in para-9 observed as under :

"9. In the present case, the sample was taken on the 20th September, 1961. Ordinarily, it should have been possible for the prosecution to obtain the report of the Public Analyst and institute the prosecution within 17 days of the taking of the sample. It however, appears that delay took place even in obtaining the report of the Public Analyst, because the Public Analyst actually analysed the sample on 3rd October, 1961 and sent his report on 23rd October, 1961. It may be presumed that some delay in the analysis by the Public Analyst and in his sending his report to the prosecution is bound to occur. Such delay could always be envisaged by the

prosecution, and consequently the elementary precaution of adding a preservative to the sample which was given to the respondent should necessarily have been taken by the Food Inspector. If such a precaution had been taken, the sample with the respondent would have been available for analysis by the Director of the Central Food Laboratory for a period of four months which would have expired about the 20th January, 1962. The report of the Public Analyst having been sent on 23rd October, 1961 to the prosecution, the prosecution could have been launched well in time to enable the respondent to exercise his right under S. 13(2) of the Act without being handicapped by the deterioration of his sample. The prosecution, on the other hand, committed inordinate delay in launching the prosecution when they filed the complaint on 23rd May, 1962, and no explanation is forthcoming why the complaint in Court was filed about seven months after the report of the Public Analyst had been issued by him. This is, therefore, clearly a case where the respondent was deprived of the opportunity of exercising his right to have his sample examined by the Director of Central Food Laboratory by the conduct of the prosecution. In such a case, we think that the respondent is entitled to claim that his conviction is vitiated by this circumstance of denial of this valuable right guaranteed by the Act, as a result of the conduct of the prosecution."

18. As against this, learned APP Mr. Mankad while contesting the above, cited two decisions of the Supreme Court, (i) in the matter of BABULAL HARGOVINDAS vs. STATE OF GUJARAT, reported in AIR 1971 SC 1277. In para 6, the Supreme Court observed as under :

"6. There is also in our view no justification for holding that the accused had no opportunity for sending the sample in his custody to the Director, Central Food Laboratory under Section 13(2) because he made no application to the Court for sending it. It does not avail him at this stage to say that over four months had elapsed from the time the samples were taken to the time when the complaint was filed and consequently the sample had deteriorated and could not be analysed. The decision of this Court in Municipal Corporation of Delhi v. Ghisa Ram, (1967) 2 SCR 116 = (AIR 1967 SC 970), has no

application to the facts of this case. In that case the sample of the vendor had in fact been sent to the Director of the Central Food Laboratory on his application but the Director had reported that the sample had become highly decomposed and could not be analysed. It is also evident from that case that the Food Inspector had not taken the precaution of adding the preservative. It appears from page 120 of the report that the elementary precaution of adding preservative to the sample which was given to the respondent should necessarily have been taken by the Food Inspector, that if such precaution had been taken, the sample with the respondent would have been available for analysis by the Director of the Central Food Laboratory and since the valuable right given to the Vendor by Section 13(2) could not be availed of, the conviction was bad. No such defence is available to the Appellant in this case because not only is there evidence that the preservative formalin was added but the Appellant had not even made an application to send the sample to the Director of Central Food Laboratory."

Learned APP to substantiate his contention, also relied upon a decision of the Supreme Court in the matter of AJITPRASAD RAMKRISHAN SINGH vs. THE STATE OF MAHARASHTRA, reported in AIR 1972 SC 1631. In para 6, the Supreme Court observed as under :

"6. In this Appeal, counsel for the appellant contended that the appellant was deprived of his right to have the sample analysed by the Director on account of the delay in the service of summons. He said that the appellant was acquitted by the Magistrate because the Magistrate found that on account of the delay it would be a futile exercise to have sent the sample for analysis to the Director and as the laches of the complainant was the reason for the delay in the service of summons and the proximate cause of the appellant losing his right to get the part of the sample delivered to the vendor and analysed by the Director, the appellant was entitled to be acquitted. He relied on the decision of the Court in Municipal Corporation of Delhi v. Ghisa Ram, (1967) 2 SCR 116 - (AIR 1967 SC 970), to support his contention. We do not think that the case would in any way assist the appellant. In that case, the part of the sample

delivered to the vendor had been sent to the Director on the application of the vendor but, the Director reported that the sample had become highly decomposed and could not be analysed. It was not disputed in that case that the Food Inspector had not taken the prosecution of adding the necessary preservative to the sample. So the Court held that the valuable right given to the vendor under section 13(2) of the Act could not be availed of and the conviction was bad. In the present case, the appellant never applied to the Court to have the part of the sample with him analysed by the Director. Section 13(2) of the Act states :

" After the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the Court for sending the part of the sample mentioned in sub-clause (i) or sub-clause (iii) of Clause (c) of sub-section (1) of section 11 to the Director of the Central Food Laboratory for a certificate; and on receipt of the application, the Court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and may then despatch the part of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the Court in the prescribed form within one month from the date of receipt of the sample, specifying the result of analysis."

It is clear from the sub-section that the appellant should have made an application after paying the prescribed fee if he wanted the part of the sample available with him to be sent to the Director for analysis. If he had made the application after paying the prescribed fee, the Magistrate would have had no option but to send the part of the sample for analysis by the Director. If in pursuance of the application the part of the sample was sent to the Director and he had reported that the part of the sample was incapable of analysis for the reason that it was decomposed, the appellant could perhaps, have contended that he was deprived of his right to have the sample analysed by the Director on account of the laches of the complainant and that he should be acquitted. But, since the appellant never applied under section 13(2) of the Act, he

cannot complain that he has been deprived of any right. In Babulal Hargovindas v. The State of Gujarat, 1971 -1 SCC 767 = (AIR 1971 SC 1277) Jagannmohan Reddy, J., speaking for the Court, said that unless an application to send the sample to the Director is made, the vendor cannot complain that he was deprived of his right to have the sample analysed by the Director."

19. It was vehemently contended by learned APP that, according to these two decisions of the Supreme Court, unless and until the Vendor exercises his valuable right under Section 13(2) and since the sample for analysis by the Central Food Laboratory, the accused cannot say that prejudice is caused to him. It was urged that it is only when the Central Food Laboratory opines that the sample was not fit for analysis and decomposed, then only it could be said that the right of the accused under Section 13(2) is jeopardized and prejudice is caused to the accused. It was urged that, in this case, neither the accused show during evidence that any prejudice is caused to him nor the sample at any time was attempted to send to the Central Food Laboratory. It was, therefore, urged that this contention on behalf of the petitioners is substanceless.

20. To consider this contention, all the three decisions of the Supreme Court, as cited above, will have to be seen on facts also. True it is that merely launching the prosecution late by the Food Inspector, is not fatal to the prosecution case. At the same time, whether launching of the prosecution late, is fatal or not depends upon the facts and circumstances of the each case and it was argued on behalf of the State respondent that the prejudice can be caused only if the Central Food Laboratory after exercising the right of the petitioner under Section 13(2) has opined that the second sample was not fit for analysis. Rules 19 and 20 of the Food Adulteration Rules, 1955 prescribes adding of the preservative in the sample. This fact has to play an important role so far as this prosecution is concerned. In the background of the facts stated above, and the contentions raised by learned APP on behalf of the State, it is necessary to discern the ratio laid down by the Supreme Court in the matter of MUNICIPAL CORPORATION OF DELHI vs. GHISA RAM, reported in AIR 1967 SC 970. In AIR 1967 SC 970, the ratio laid down is as under :

" It may be presumed that some delay in the analysis by the Public Analyst and in his sending his report to the prosecution is bound to occur.

Such delay could always be envisaged and therefore the Food Inspector is duty bound to take the elementary precaution of adding preservative to the sample which is given to the accused - vendor and now as per the new Rule, the sample is to be sent to the Court. "

21. While in the facts of the decision of the Supreme Court in the matter of BABULAL HARGOVINDAS vs. STATE OF GUJARAT, reported in AIR 1971 SC 1277 and in the matter of AJITPRASAD vs. STATE OF MAHARASHTRA, reported in AIR 1972 SC 1631, the preservative was added to the sample of milk. The precautions were taken by the Food Inspector, the prosecution was delayed by four months and, therefore, unless the second sample which contained preservative is examined by the Central Food Laboratory, it could not be said that any prejudice is caused to the accused. This is so because when preservative is added natural presumption would be, the sample is not decayed or deteriorated, unless so opinioned by the expert. While going through the above said decisions of the Supreme Court, it clearly appears that since the preservative was added to the sample, the same was not likely to be deteriorated ordinarily in 4 months and therefore the Supreme Court ruled that the defence of deprivation of valuable right was not available to the accused in absence of expert opinion that sample was deteriorated and was unfit to analyze. In the matter of Babulal Hargovindas (supra) in para 6, the Apex Court has categorically observed while distinguishing the case from the case of Municipal Corporation vs. Ghisa Ram (supra) by saying that "no such defence is available to the Appellant in this case because not only is there evidence that the preservative formalin was added but the Appellant had not even made an application to send the sample to the Director of Central Food Laboratory. Before that the Supreme Court also observed that in the case of MUNICIPAL CORPORATION OF DELHI vs. GHISA RAM, reported in AIR 1967 SC 970, "it is also evident that the Food Inspector had not taken the precaution of adding the preservative. It appears from page 120 of the report that ultimately precaution of adding the preservative to the sample which was given to the respondent should necessarily have been taken by the Food Inspector that if such precaution is taken, the sample with the respondent would have been available for the analysis by the Director of the Central Food Laboratory."

22. Meaning thereby that the ratio of the 1967 SC decision is that since some delay is bound to occur in filing the complaint, the Food Inspector must take the

elementary precaution of adding the preservative in the sample which is produced. Now, the Supreme Court decisions reported in AIR 1971 SC 1277 and AIR 1972 SC 1631, cannot be construed to lay down a ratio that unless and until the accused sends the second bottle to the Central Food Laboratory, it cannot be said that any prejudice is caused to him but, on the contrary, both the decisions lay down the ratio that when the Food Inspector has taken elementary precaution to add preservative to the sample, and prosecution is launched late by four months, then unless the accused exercises his right under Section 13(2) of the Prevention of Food Adulteration Act, 1954, it cannot be said that any prejudice is caused to the accused. None of the decisions reported in AIR 1971 SC 1277 or AIR 1972 SC 1631 modifies, distinguishes or disturbing the ratio laid down by the Supreme Court in AIR 1967 SC 970 that some delay in launching the prosecution is inherent and, therefore, the Food Inspector must take elementary precaution to add the preservative.

23. Therefore, in the case at hand, admitted fact remains, the prosecution came to be launched against the present petitioners after 15 months obtaining the sample Tikha Ganthiya (farsan) and admittedly the Food Inspector did not take elementary precaution to add preservative to the sample. The accused could exercise their rights under Section 13(2) of the Prevention of Adulteration Act only after the complaint is filed. It is an undoubted fact that no preservative was added to the sample of Tikha Ganthiya as admitted by the Food Inspector. As discussed above, none of the decisions of the Supreme Court cited above i.e. in the matter of BABULAL HARGOVINDAS vs. STATE OF GUJARAT, reported in AIR 1971 SC 1277 and in the matter of AJITPRASAD RAMKISHAN SINGH vs. THE STATE OF MAHARASHTRA, reported in AIR 1972 SC 1631, lays down the ratio that unless and until the accused exercises his right under Section 13(2), the defence of prejudice is not available to the accused, but the ratio is when the elementary precaution of adding preservative is taken by the Food Inspector and if the prosecution is launched late by four months, then the defence of launching of the prosecution late and causing prejudice to the accused is available only when the accused exercises his right under Section 13(2) of the Act. Therefore, in the case like this, when preservative is not added and prosecution is launched late by 15 months, it is open to the accused to rely upon the circumstances of the case of the prosecution and raise a defence that prejudice is caused to him. It is not at all necessary that the accused will have to obtain an

opinion of the Central Food Laboratory for the conclusion that the sample after 15 months is decomposed and deteriorated and analysis is not possible. On the contrary, the accused can show that in the 15 months in the natural course of event, such sample is likely to be deteriorated that even if it is sent to the Central Food Laboratory, prejudice may be caused to him because of the natural chemical process in absence of adding of the preservative which the food stuff is bound to develop.

24. In a decision of this Court reported in GELA HIRA RABARI vs. S.V. PANDYA, reported in AIR 1970 Guj. 235, this Court observed that Rule 20 in respect of adding of the preservative in certain quantity is not mandatory but directory. In that case, the preservative was added less than the quantity prescribed by Rule. 20. In these facts of the case, this Court observed in a decision that the Rule is directory but there must be a substantial compliance of the rule. The facts of the case in that case before this Court was of adding of less quantity of the preservative than prescribed by Rule 20. Vide Para 23, an apprehension on behalf of the accused was expressed to the Court that in the event, Rule is directory, a Food Inspector may not at all add preservative in the sample taken. This Court dealing with this apprehension of the accused observed as under :

" In such an event, the Court would consider whether the process of acidification or fermentation has started and the articles of food is decomposed, thus making the analysis of the article of food impossible and will adjudge the case on its merits. "

Therefore, it cannot be said that unless and until the accused exercises his right under Section 13(2) no prejudice is caused to the accused by launching the prosecution late. It depends upon the facts and circumstances of the each case. Rule 52 defines preservative means a substance which when added to food, is capable of inhibiting, retarding or arresting the process of fermentation, acidification or other decomposition of food. Rule 20 is in respect of adding the prescriptive though Rule 19 clearly says that it is not obligatory on the Food Inspector to add the preservative and, therefore, the Supreme Court in the matter of MUNICIPAL CORPORATION OF DELHI vs. GHISA RAM (supra) ruled that it was likely that some delay would be caused in launching the prosecution and hence the elementary precautions of adding the preservative was required. This ratio is not disturbed by the Supreme

Court in the later decisions, viz. (i) in the matter of BABULAL HARGOVINDAS vs. STATE OF GUJARAT, reported in AIR 1971 SC 1277 and in the matter of the AJITPRASAD RAMKISHAN SINGH vs. THE STATE OF MAHARAHSTRA, reported in AIR 1972 SC 1631. Reverting to the facts of the case at hand, it will have to be adjudged that the sample of food would deteriorate or decompose within 15 months and the right under Section 13(2) of the accused is lost. In this particular case, the sample taken is a sample of food "Tikha Ganthiya" a prepared food. Though learned Advocate for the petitioners relied upon certain texts of Chemistry to convey that the prepared food is subject to fermentation, acidification and spillage. It is not necessary to narrate all the details of the Chemistry, but one can take note that the food starts spoiling after some time and this process would be accelerated depending upon the weather and the condition in which the sample is kept. The fact must be borne in mind that once the opinion of the Central Food Laboratory is obtained, the same will supersede the opinion of the Public Analyst and that opinion of Central Food Laboratory would be conclusive evidence for the analysis of the sample. Therefore, the sole question would be, in the absence of adding of the preservative to the food sample whether the sample would be in the same condition after 15 months or by natural process of decaying, spilling, fermentation, it is likely that in analysis by the Central Food Laboratory, some other results adverse to the accused may be obtained without any fault of the accused. It is not the law that to show prejudice, accused cannot rely upon the circumstances of prosecution case. The accused may rely on the fact that the preservative was not added by the Food Inspector and the prosecution was launched late by 15 months after obtaining the sample. The accused may rely on the natural course of event that prepared food will start decaying after some days. The accused may contend to show prejudice caused to him that it was of no use to send the sample to Central Food Laboratory for analysis because results were likely to supersede the earlier report. Hence in the facts and circumstances of this case, it cannot be said that to obtain the opinion that the sample was unfit for analysis the accused was obliged to send the same to the Central Food Laboratory and if an opinion is in positive, then only, the defence of the prejudice is available to the accused.

25. In this view of the matter, since this aspect was not considered in its proper perspective by both courts below and since the defence of the accused is prejudiced as said above by launching the prosecution late by 15 months and by not adding the preservative to the sample

which would subject to natural decay and spillage in 15 months, the benefit of doubt must tilt in the favour of the accused. In these circumstances, the conviction awarded by both the courts below requires to be interfered with for the above said reasons and solely on the facts of this case.

26. In this view of the matter, this Revision Application is allowed. The order passed by the learned Judicial Magistrate, First Class, Kalavad in Criminal Case No. 488 of 1986 on 5.3.1988 convicting the accused for the offences punishable under Sections 7(1) and under Section 16 (1)(a)(i) of the Prevention of Food Adulteration Act is set aside as well as the order of the Appellate Court passed in Criminal Appeal No. 32/88 on 27th September, 1994 confirming the above said conviction by the learned Magistrate, Kalavad, is also set aside, and the accused, on the principle of benefit of doubt, are acquitted for the charges levelled against them in Criminal Case No. 488 of 1986. Rule made absolute to that extent. Bail bonds of the petitioners shall stand cancelled. R & P be sent back to the trial court. Fine, if any, paid by the petitioners be refunded.

(J.R. Vora, J.)
p.n.nair